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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 WOODY HANSE,
11 Petitioner,
12 v.
13 SHAWN HATTON,
14 Respondent.

15 Case No. 18-cv-00095-RS (PR)

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17 **ORDER OF DISMISSAL**

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20 **INTRODUCTION**

21 Petitioner seeks federal habeas relief under 28 U.S.C. § 2254 from his state
22 convictions. The petition for such relief is untimely, as respondent points out in his motion
23 to dismiss. The petition is DISMISSED.

24
25 **BACKGROUND**

26 In 2015, petitioner pleaded guilty in the Contra Costa County Superior Court to two
27 counts of committing lewd and lascivious acts on a child (Cal. Penal Code § 288) and
28 admitted to a “substantial conduct allegation.” (Mot. to Dismiss, Dkt. No. 12 at 1-2.) On
the same day, he was sentenced to eight years in state prison. (*Id.* at 2.)

29 Petitioner did not pursue any direct appeals, but he did file for state collateral relief.
30 After his state habeas petitions were denied, he filed the instant federal habeas petition.

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DISCUSSION

2 A. Standard of Review

3 Federal habeas petitions must be filed within one year of the latest of the date on
4 which: (A) the judgment became final after the conclusion of direct review or the time
5 passed for seeking direct review; (B) an impediment to filing an application created by
6 unconstitutional state action was removed, if such action prevented petitioner from filing;
7 (C) the constitutional right asserted was recognized by the Supreme Court, if the right was
8 newly recognized by the Supreme Court and made retroactive to cases on collateral
9 review; or (D) the factual predicate of the claim could have been discovered through the
10 exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1). This one-year clock starts ticking
11 90 days after direct state review is final. “[W]hen a petitioner fails to seek a writ of
12 certiorari from the United States Supreme Court, the AEDPA’s one-year limitations period
13 begins to run on the date the ninety-day period defined by Supreme Court Rule 13
14 expires.” *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

15 B. Timeliness of the Petition

16 Because he did not file an appeal, petitioner’s conviction became final on July 6,
17 2015, which was 60 days after he was sentenced (May 7, 2015). *See* Cal. Rules of Court,
18 rule 8.308(a). He then had one year, until May 8, 2016, to file a timely federal habeas
19 petition.

20 The instant federal habeas action, however, was not filed until December 27, 2017¹,
21 well after the May 8, 2016 deadline. On this record, absent sufficient statutory or equitable
22 tolling, the petition is barred by AEDPA’s statute of limitations and must be dismissed.
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25 ¹ Petitioner is entitled to this filing date, rather than the January 5, 2018 date listed in the
26 docket. The Court assumes that he put the petition in the prison mail the day he signed it
27 (December 27, 2017) and will use that as the filing date under the prisoner mailbox rule.
See generally Houston v. Lack, 487 U.S. 266, 276 (1988).

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1 **1. Statutory Tolling**

2 Relief from AEDPA's one-year deadline is available in the form of statutory tolling,
3 if certain conditions are met. The time during which a properly filed application for state
4 post-conviction or other collateral review is pending is excluded from the one-year
5 limitations period. *See 28 U.S.C. § 2244(d)(2).*

6 Petitioner is entitled to some tolling, as respondent concedes, though it is not
7 enough tolling to save the petition. He is entitled to 255 days of tolling, the time during
8 which his first round of state habeas petitions was pending in the state superior, appellate,
9 and supreme courts. This first round began on April 13, 2016, when he filed a petition in
10 the superior court, and ended on January 18, 2017, when the state supreme court denied the
11 petition he filed there. These 255 days extend the federal filing deadline from May 8, 2016
12 to January 17, 2017.

13 Even with this new filing deadline, the petition is untimely. The federal petition
14 was filed on December 27, 2017, which is well after the January 17, 2017 deadline.

15 Petitioner contends he is entitled to additional tolling for the time during which a
16 second round of state habeas petitions was pending. This second round began on June 20,
17 2017 with a petition filed in the superior court and ended on January 31, 2017 when the
18 state supreme court denied the petition he filed there. (MTD, Dkt. No. 12 at 2.)

19 Petitioner is not entitled to statutory tolling for this second round of state habeas
20 petitions. Once the federal limitations period expired on January 17, 2017, any
21 subsequent state petitions (such as the June 20, 2017 one) cannot toll the filing deadline.
22 "Once the limitations period is expired, collateral petitions can no longer serve to avoid a
23 statute of limitations." *Rashid v. Kuhlmann*, 991 F. Supp. 254, 259 (S.D.N.Y. 1998).

24 Petitioner also contends he filed another petition on January 2, 2017 (which he
25 alleges he refiled in April 2017) in the Contra Costa County Superior Court and is entitled
26 to further tolling for the time during which those petitions were pending. (Opp. to MTD,
27 Dkt. No. 13 at 1-2.) There is no support for his assertion that he filed these petitions. The

1 copies he appends to his federal filing bear no indication of filing, e.g., there is no court-
2 receipt stamp or case number. (*Id.* at 5-20.) Furthermore, petitioner gives contradictory
3 dates for filing. In his opposition, he says he filed the petitions in 2017, but in another
4 filing he asserts he filed them in 2018. (Dkt. No. 16 at 1.) The certificates of service
5 petitioner filed and the petitions themselves bear “2017.”

6 According to respondent, (i) there is nothing in petitioner’s outgoing mail record to
7 show he ever sent these petitions; and (ii) the Contra Costa Superior Court has no record of
8 any petitions filed by petitioner in the first five months of 2017. (Reply, Dkt. No. 17 at 2-
9 3.) Because petitioner has not established that he filed these petitions, he is not entitled to
10 any additional tolling based on them. Absent adequate equitable tolling, the petition will
11 be dismissed as untimely.

12 **2. Equitable Tolling**

13 Relief from the one-year deadline of AEDPA is available in the form of equitable
14 tolling, if certain conditions are met. A petitioner is entitled to equitable tolling “only if he
15 shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
16 circumstance stood in his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S.
17 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408 (2005)). Equitable tolling is
18 not granted as a matter of course. In fact, it is “unavailable in most cases.” *Miranda v.*
19 *Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *Miles v. Prunty*, 187 F.3d 1104,
20 1107 (9th Cir. 1999)). “[T]he threshold necessary to trigger equitable tolling [under
21 AEDPA] is very high, lest the exceptions swallow the rule.” *Id.* (citation omitted).

22 Petitioner provides no basis for a grant of equitable tolling. He quotes from a Ninth
23 Circuit case, but does not show how it applies to his suit. (Opp., Dkt. No. 13 at 3.) He
24 provides no facts showing that he has been pursuing his rights diligently and that some
25 extraordinary circumstance prevented timely filing. The petition will be dismissed.

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CONCLUSION

2 Respondent's motion to dismiss the petition as untimely is GRANTED. (Dkt. No.
3 12.) The petition is DISMISSED.

4 A certificate of appealability will not issue. Petitioner has not shown "that jurists of
5 reason would find it debatable whether the petition states a valid claim of the denial of a
6 constitutional right and that jurists of reason would find it debatable whether the district
7 court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
8 The Clerk shall terminate all pending motions, enter judgment in favor of respondent, and
9 close the file.

10 **IT IS SO ORDERED.**

11 **Dated:** January 31, 2019



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13 RICHARD SEEBORG
14 United States District Judge
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